**U.S. Department of Labor**

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

**Issue Date: 27 January 2005**

**CASE NO. 2004-LHC-00289**

**OWCP NO. 13-100338**

*In the Matter of:*

**DAVID KOLINA**,
Claimant,

vs.

**PORT OF OAKLAND CONSTRUCTORS,**
Employer,

and

**CAMBRIDGE INTEGRATED SERVICES GROUP, INC.,**
Carrier.

*Appearances:*

Derek B. Jacobson, Esq.
McGuinn, Hillsman & Palefsky
San Francisco, California
For the Claimant

Roger A. Levy, Esq.
Laughlin, Falbo, Levy & Moresi
San Francisco, California
For the Respondents

Isabella M. Del Santo, Esq.
Office of the Regional Solicitor
71 Stevenson Street, Ste. 1110
San Francisco, CA
For the District Director, OWCP

*Before:*

William Dorsey
Administrative Law Judge

## DECISION AND ORDER AWARDING BENEFITS

David Kolina brings this claim for permanent total and permanent partial disability benefits against Port of Oakland Constructors; it arises under the Longshore and Harbor Workers' Compensation Act, as amended (the Act), 33 U.S.C. Section 901 *et seq.* Claimant is entitled to those benefits.

At trial Claimant's Exhibits (CX) 1-11; and Employer's/Carriers Exhibits (EX) 1-18 were admitted into evidence. A post-trial deposition of Dr. Claude Munday is admitted as EX 19.[1] The post-trial briefs and proposed decisions and orders filed by the Claimant is admitted into evidence as ALJX 1 and that from the Employer as ALJX 2.

### Stipulations of Fact

The Claimant and Employer stipulated to these facts, which the District Director did not dispute in his pretrial Statement of Position:

1. The Act applies to the claim;

2. Claimant was employed as a journeyman pile driver when injured;

3. The injury arose out of and in the course of his employment;

4. His claim was timely noticed and filed;

5. He reached maximum medical improvement (MMI) on September 6, 2001;

6. He is incapable of returning to his usual and customary work as a pile driver;

7. He enrolled in a rehabilitation program sponsored by the Department of Labor from August 7, 2001 to December 4, 2002; and

8. Employer submitted a timely petition for relief under Section 8(f) of the Act;

9. After trial the parties agreed in their proposed orders that the Claimant's average weekly wage at the time of the injury was $1,316.61, making his compensation rate for all periods of total disability $868.96. The District Director took no position on the average weekly wage in his Statement of Position.

### Issues

The issues for adjudication are:

1. Nature and extent of Claimant's disability, including:
    a. The date his disability became partial rather than total; and

[1] At trial, the record was left open for either an additional report or deposition of Dr. Munday. See Tr. ("Tr.") at 185-88.

b. His residual wage earning capacity after that change;

2. Whether Employer is entitled to Section 8(f) relief; and

3. The attorney's fees and costs due to Claimant's counsel.

Summary of Evidence

Port of Oakland Constructors (Employer) employed David Kolina (Claimant) as a journeyman pile driver in bridge building. He is a college graduate and union member with long experience in commercial marine construction, including large reinforced concrete foundations, pile driving and placement of structural steel in bridge construction work. Farrell Depo. at 18, 22. Pile driving is categorized as very heavy exertional work in the Secretary's *Dictionary of Occupational Titles*. Tr. at 168.

After a concrete bridge deck had been poured, Claimant was removing the forms from its underside on February 9, 2001. A large chunk of the form fell onto a piece of wood he stood on, catapulting him see-saw fashion into the air. Fortunately he was wearing a hard hat when he struck his head on the bottom of the concrete deck, dissipating the force throughout his cervical and thoracic spine. Stunned, he never lost consciousness, but felt pain in his neck. He immediately was taken for medical care. CX 1 at 1-13; Tr. at 79-82. The first physician who saw him, Ramon Terrazas, M.D., diagnosed neck and thoracic sprain. Claimant returned to light duty the next day wearing a cervical collar, with restrictions against repetitive lifting of more than ten pounds, and no reaching over the shoulder. CX 5 at 57-58; Tr. at 82. By February 12, 2001, Dr. Terrazas diagnosed an intracranial injury. CX 5 at 57. Claimant stopped working as a pile driver due to pain and his physical limitations, and has been unable to return to construction employment. Tr. at 83.

He had suffered serious injuries to his head and neck in an automobile accident in late 1993. Displacement of his C1 vertebrae, as well as displacement and fracture of the C2 and fracture of the C3 had required him to be placed in a Halo external fixator for several months to totally immobilize his cervical spine. He recovered fully and resumed full time work as a pile driver without permanent restrictions.

An MRI done about a month after the 2001 injury showed herniated intervertebral discs in his thoracic spine at the T-7 and T 11-12 levels that both impinged on the spinal cord. CX 5 at 44-45. It also revealed degenerative changes and herniations at the C4-5 and C5-6 levels, again with spinal cord impingement at both levels. CX 5 at 43. Dr. Terrazas then referred Claimant for care by a neurosurgeon, Ronald Shallat, M.D., who diagnosed cervical and lumbar spondylosis, recommended that Claimant not return to heavy manual labor, but did not recommend surgery. CX 4 at 26-27. *Id*.

As no surgery was to be done, Sanjay Patel, M.D., a physiatrist, assumed Claimant's care by May 2001. He prescribed acupuncture, an inferential stimulator unit, medication, paraspinal injections for pain. He ordered an EMG study to rule out cervical radiculopathy, and continued the restrictions against any return to pile driving. Claimant became depressed due to his neck

condition. CX 5 at 39-40. On September 6, 2001, Dr. Patel determined that Claimant had reached MMI. Claimant could not return to pile driving, given the compression of the spinal cord in both his thoracic and cervical spine, the degeneration of the intervertebral bodies at several levels, and his head injury. Additional work restrictions included a prohibition against walking on ladders or at heights, no overhead lifting of more than thirty pounds, and no employment in the construction industry. CX 5 at 32. Dr. Patel recommended future medical care only if Claimant experienced exacerbations in his condition. *Id*. Claimant still feels limitation of motion in his neck and right shoulder. Tr. at 87-88.

Claimant began a vocational rehabilitation program sponsored by the Office of Workers' Compensation Programs with counselor Timothy Farrell. Tr. at 90; CX 10 at 10; CX 7 at 144. Mr. Farrell recommended that Claimant build on his skills in the construction trades; they selected training as a construction cost estimator and construction project manager. These were appropriate occupations, but it is not clear that detailed analyses were made about the likelihood of finding work in them in the Bay Area. In January 2002, as part of his rehabilitation plan, Claimant enrolled in courses at Turnkey Construction Institute, and later at California State University at Hayward in its Construction Management Certificate program. Tr. at 92; CX 7 at 128; CX 10 at 9-10. After he completed the program at Turnkey, Mr. Farrell suggested that he enroll at the Martinez Adult School to obtain facility in use of the Excel spreadsheet computer program commonly in these occupations. CX 7 at 96, 104; CX 10 at 16-27.

By August 2002, Mr. Farrell and Claimant concentrated on job searches and placement. CX 7 at 90-91. Claimant applied for all positions the counselor identified. He received one interview, but no job offers. CX 7 at 78, 83, 87. Mr. Farrell's closing report stated that a downturn in the construction industry led Bay Area employers to hire only estimators and project managers with five years of experience in those jobs. Claimant was not an attractive candidate in that market, having graduated at the "worst possible time". Farrell Depo. at 28. Claimant resisted suggestions to pursue other "survival" entry level positions, such as a counter/rental clerk for equipment rental firms or an order clerk for motor vehicle, janitorial or maintenance services at low wages. Farrell Depo. at 22-23, 39-40; CX 7 at 67-68; CX 10 at 22-25. No labor market surveys were done to assess the availability of those less skilled jobs.

At the Employer's behest a vocational counselor, Kathryn Melamed, a certified vocational rehabilitation with thirty-five years of experience[2], prepared two labor market surveys. Tr. at 169-170. She never provided vocational counseling to Claimant. I find it unlikely that in the labor market after his graduation Claimant could have successfully competed for jobs in the occupation of estimator or construction manager. Tr. 170-176. Her first survey, dated March 6, 2002, done before the vocational training was completed, identified unskilled positions with pay ranging from $9.42-$14.18 per hour, including unskilled or semiskilled jobs as a cashier, parking lot attendant, security operator, telemarketer, without showing the availability of specific positions. EX 10. Ms. Melamed's second labor market survey, dated March 3, 2003, identified several positions with hourly salaries ranging from $10.38-$15.66. EX 11.

[2] Ms. Melamed is certified by the United States Department of Labor and the State of California. Tr. at 144-45.

The Employer has made a persuasive case that as of the time of the second survey in March 2003, jobs were available that would have paid approximately $300.00 per week, adjusted back to the pay for those positions at the time of the injury in 2001. *Cf*., Tr. at 179 (stating the wages were adjusted back to the 2001 levels).

On November 4, 2002, orthopedic surgeon Fred Blackwell, M.D., became Claimant's treating physician. Dr. Blackwell diagnosed Claimant with cervical/thoracic strain and sprain. CX 11 at 10. Dr. Blackwell also reported that Claimant complained of memory loss and depression due to his injury. CX 11 at 13-14, 18. Dr. Blackwell suggested psychological counseling to Claimant, in addition to neuropsychological testing to determine if Claimant had experienced any brain damage as a result of his February 2001 accident. Blackwell Depo. at 17; CX 2 at 13-15; CX 11 at 13-14.

Dr. Weber, a psychiatrist, examined Claimant on March 24, 2003 (*i.e*., after the 2003 Melamed labor market survey) and diagnosed an adjustment disorder. Dr. Weber believed that this condition began in about August to September 2002, and identified its cause as Claimant's failed attempt at vocational rehabilitation, unemployment, and ongoing uncertainty about future employment prospects. CX 3 at 24. Dr. Weber thought the condition would resolve if Claimant found a new job. Dr. Weber stated "[s]ome supportive and encouraging counseling likely would help Mr. Kolina feel better . . .[o]bviously the treatment that would be curative would be employment." CX 3 at 24-25.

Claimant was also examined by clinical psychologist Claude Munday, Ph.D., at the request of Employer. Dr. Munday performed neuropsychological tests to determine if Claimant had experienced any brain injury as a result of the 2001 accident. Dr. Munday Depo. Part I at 17. The results reflected that Claimant was suffering from both depression and chronic pain. These factors, rather than brain injury, were the cause of Claimant's behavioral change. Dr. Munday Depo. Part I at 17-18. There was insufficient evidence to diagnose a brain injury arising from the February 2001 accident. Dr. Munday Depo. Part I at 18.

Assessing the functional effect of these mental limitations, Dr. Munday thought Claimant was experiencing a "mild impairment," according to the taxonomy used in the American Medical Association's *Guidelines for the Evaluation of the Permanent Impairment (5th Edition)*. Dr. Munday Depo. Part II at 41-42. A mild impairment means that an individual's "impairment levels are compatible with most useful functioning." A.M.A., *Guidelines for the Evaluation of the Permanent Impairment* at 363 (5th Ed.). If Claimant came to feel useful and productive, his impairments could be minimized to the point that he would experience little or no functional impairment. Dr. Munday Depo. Part II at 41-42. In a work setting, Dr. Munday expected Claimant would have difficulty with situations where information would come at him rapidly, or where he would be required to think on his feet. Dr. Munday Depo. Part II at 46. After examining both labor market surveys Ms. Melamed prepared, Dr. Munday thought that Claimant would be capable of performing the jobs listed, with the exception of substitute teacher. Dr. Munday Depo. Part II at 44-45. Dr. Munday also testified that Claimant was capable of working as a contractor, as long as there was no physical labor or so much information to deal with that he felt overwhelmed. Dr. Munday Depo. Part II at 48.

Claimant has been unable to find any work as an estimator or construction manager. Claimant studied for and passed the California state examination for a real estate appraiser trainee in February 2004. Tr. at 100. This achievment provides additional evidence that Claimant suffers from no serious mental dysfunction.

**Discussion**

A. Date and Extent of Disability

*Temporary vs. Permanent Disability*

The Claimant and Employer agree that Claimant reached MMI on September 6, 2001. ALJX 1 at 9; ALJX 2 at 3. Until that time he was entitled to his weekly compensation rate of $868.96 as temporarily totally disabled. His temporary disabilities became permanent ones then, based on his medical condition. *Stevens v. Director, O.W.C.P.*, 909 F.2d 1256, 1259 (9th Cir. 1990).

*Total vs. Partial Disability*

The record supports the stipulation that Claimant was totally disabled for the period from February 17, 2001 to September 6, 2001. He remains incapable of returning to his usual and customary work as a journeyman pile driver.

Claimant's OWCP-sponsored vocational rehabilitation program began in August 2001 (just before he reached MMI), and it ended on December 4, 2002. Employer concedes he remained entitled to temporary total disabillity benefits at his compensation rate of $868.96 while he was engaged in the Department of Labor vocational rehabilitation program. *See Louisiana Ins. Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Castro v. General Constr. Co.*, 37 BRBS 65 (2003).

Claimant asserts he remained totally disabled until February, 21, 2004, when he began a job he found as a limousine driver that comports with his orthopedic and psychological limitations. ALJX 1 at 9. Employer contends that Claimant's disability changed categories from total to partial disablility as soon as he completed the OWCP-sponsored rehabilitation program on December 4, 2002. ALJX 2 at 14. The completion of the vocational training would not cause a change in that category (total vs. partial).

A claimant who cannot return to his past work moves from total to partial disability when an the employer demonstrates the claimant had suitable alternative employment available. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do this, an employer must prove realistic job opportunities were available that the claimant could perform, considering the worker's age, education, work experience, and physical restrictions. *Edwards v. Director, OWCP*, 99 F.2d 1374 (9th Cir. 1993); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). If the employer satisfies this burden, the claimant is no more than partially disabled. *See, e.g., Container Stevedoring Co. v. Director OWCP*, 935 F.2d

1544 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). A claimant can rebut the employer's showing that suitable alternate employment is available, and remain eligibile for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Employer was required to submit proof of actual, not theoretical job opportunities, by identifying specific jobs available within the local community. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). While Claimant generally need not show that he has tried to obtain employment, he bears the burden of demonstrating his willingness to work once suitable alternative employment has been demonstrated. *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984); *Wilson v. Dravo Corp.*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Constr. Co.*, 17 BRBS 156 (1985). Employer's evidence of suitable alternate employment were its two labor market surveys, EX 10 dated March 6, 2002 (the 2002 Survey), and EX 11, dated March 3, 2003 (the 2003 survey).

Both surveys review Claimant's medical history, involvement with the vocational rehabilitation program, and the results of various aptitude tests. The 2002 Survey, however, identifies no specific positions employers were offering then. It summarizes positions Claimant would qualify for, given his educational background and age, and describes their salaries.[3] EX 10. The survey says the availability of work will be discussed in a subsequent report, entitled the "Labor Market Survey," but if such a report was ever prepared, it neither was attached nor offered into evidence. EX 10 at 147. This March 2002 labor market survey does meet the standards for suitable alternative employment. *See Edwards*, 99 F.2d at 1374; *Bumble Bee Seafoods,* 629 F.2d at 1330.

The 2003 Survey, in contrast, indicates several viable occupations within Claimant's geographical region, commensurate with Claimant's educational background, age and skill level.[4] EX 11. Ms. Melamed contacted most of the employers to ensure they were hiring and would accept applicants with Claimant's background. EX 11 at 154-163. The jobs identified are all within the work restrictions prescribed by Dr. Patel, with little lifting and no hard manual labor. These jobs have an extremely broad salary range. For example, a job as an insurance claims adjuster shows a weekly salary range of $460-660, whereas the assembler position would pay $300 per week. EX 11 at 164. These jobs fulfill the requirements set forth in *Edwards* and *Bumble Bee Seafoods*. Furthermore, Dr. Munday, who examined Claimant and reviewed the 2003 Survey, believed that Claimant could perform these positions. Dr. Munday Depo. II at 44-46.

[3] The Survey mentions Insurance Claims Adjustor, Appraiser, Substitute Teacher, Sales Associate, Security Operator/Guard, Photo Apprentice Tech, Telemarketing, Cashier, and Assembler. The Survey notes that the following occupations were discussed with regards to availability: estimator, project manager and order taker. EX 10.

[4] These include Insurance Claims Adjuster, Sales Associate, Security Operator/Guard, Cashier, Assembler and Parking Lot Attendant. EX 11 at 164 (internal page 17).

The 2003 Survey includes some positions that fall short of the *Edwards* and *Bumble Bee Seafoods* requirements. The jobs for a telemarketer and a photo apprentice technician were unavailable at the time the 2003 Survey was prepared. EX 11. The 2003 Survey identified "Appraiser Trainee" as a possible profession for Claimant and identified two jobs in this field. Of these two positions, one job was located in Southern California, well outside Claimant's appropriate geographical region. The other position would require Claimant to become temporarily certified as an appraiser for property tax, a credential he did not have. EX 11. These positions, therefore, do not qualify as suitable alternative employment for Claimant. Finally, the 2003 Survey identified the position of Substitute Teacher for the Mount Diablo School District. Given Claimant's current mental state, Dr. Munday felt that this position would be inappropriate. Dr. Munday Depo. Part II at 44.

I find that the 2003 Survey demonstrated suitable alternative employment as of March 3, 2003. Claimant is permanently partially disabled on that date. *Stevens v. Director, O.W.C.P.*, 909 F.2d 1256, 1259 (9th Cir. 1990).

*Claimant's Residual Wage Earning Capacity*

Claimant believes that his current wages as a limousine driver fairly and reasonably represent his post-injury wage earning capacity at $377.20 for a forty-hour work week. ALJX 1 at 12. That is what he earned in early 2004 when he began that work, but I am not convinced he could not have obtained a job earlier. It is likely he could have obtained one of the low-paying "survival" type jobs. Employer claims that Mr. Farrell, a vocational rehabilitation counselor, identified several jobs for Claimant paying from $400 to $600 per week. EX 11 at 164. Employer claims that Claimant's residual wage earning capacity is closer to $500 per week. ALJX 2 at 14; see also the testimony of Ms. Melamed at Tr. 179.

An award for permanent partial disability is based on the difference between a claimant's pre-injury average weekly wage and his post-injury wage earning capacity. 33 U.S.C. § 908(c)(21)(h); *Richardson v .General Dynamics Corp*,. 23 BRBS 324 (1990); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1998). It is not unusual for post-injury wages to be higher than pre-injury wages due to cost of living increases or increases in the hourly pay rate. Therefore, subsections 8(c)(21) and 8(h) of the Act require that wages earned post-injury be adjusted to wage levels that the relevant jobs paid at the time of the injury. *Richardson*, 23 BRBS 324.

In March 2003 his residual earning capacity was rather low, based on the low skills employers required for the positions he likely could obtain, *e.g.*, as a security guard, sales associate, cashier, assembler or parking lot attendant. He likely would have been hired at the low end of the range, for there is no evidence that skills acquired in his past construction work would have given him a productivity advantage in these positions. Claimant's injury occurred in 2001; at that time, average weekly wages for these jobs hovered around $7.00 per hour or so, yileding a weekly wage of about $300.00.[5] CX 11 at 17. Therefore, I find that Claimant is entitled to unscheduled permanent partial disability benefits based on a post-injury earning capacity of $300.00 per week as of March 3, 2003.

[5] Vocational Counselor Ms. Melamed provided a chart in EX 11 comparing wages for positions in 2001 and 2003, which was used to calculate Claimant's average weekly wage.

Claimant's Average Weekly Wage

33 U.S.C. section 910(c) provides the basic formula for determining the average weekly wage, and subsequently, compensation to which Claimant is entitled. Section 910(c), in relevant part, states that:

> average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees in the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee . . ., shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c) (1999). Once an adjudicator determines claimant's average annual wage, it must determine the average weekly wage by dividing the average annual wage by fifty-two. 33 U.S.C. § 910(d)(1). This provides the basis for the compensation rate. *See* 33 U.S.C. § 908.

Claimant's employment was stable and continuous for the fifty two weeks prior to the date of his injury, and that he worked 194 days out of a possible 260 days, or 74.6% of the year. ALJX 1 at 8; CX 6 at 59-64. Thus, Claimant's earnings for the year prior to his injury were $51,086.36. CX 6; *Matulic v. Director, OWCP/Jones Stevedoring Co.*, 32 BRBS 148 (9th Cir. 1998); *Price v. Stevedoring Services of America*, 38 BRBS 56 (2002). Applying section 10(a), Claimant's actual earnings divided by 194 days, yields an average daily wage of $263.32. Multiplying this daily wage by 260 days, and then dividing by fifty-two, provides an average weekly wage of $1,316.61. In this case, Claimant and Employer agree that Claimant's average weekly wage is $1,316.61. ALJX 1 at 8; ALJX 2 at 14. Accordingly, Claimant's average weekly wage is $1,316.61, as the parties have agreed in their post trial filings.

Section 8(f) Relief

Under section 8(f) of the Act, an employer may limit its liability for payment of permanent disability to 104 weeks compensation if three elements are present:

(1) The injured worker had an existing permanent partial disability before the most recent injury;

(2) The injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and

(3) Depending on whether the present disability is total or partial,

(a) if the present permanent disability is total, it is not due solely to the most recent injury; or

(b) if the present permanent disability is partial, it is materially and substantially greater than that which would have resulted from the most recent injury along without the contribution of the pre-existing permanent partial disability.

33 U.S.C. § 908(f); *Lockheed Shipbuilding v. Director, OWCP*, 25 BRBS 85, 87 (CRT)(9th Cir. 1991); *see Director, OWCP v. Newport news Shipbuilding & Dry Dock Co. (Carmines)*, 138 F.3d at 138-39.

Employer claims that it is entitled to Section 8(f) relief. The Director argues that Employer's application for Section 8(f) relief should be denied because Employer failed to submit two copies of their application, as required by the *Code of Federal Regulations*. However, even if two copies had been submitted, the Director claims the application would have been denied for these reasons:

1) Pre-existing Condition: Employer failed to submit medical evidence in support of its Section 8(f) application to establish the existence of any pre-existing permanent partial disability. The Director asserts that the fractures Claimant suffered in the motor vehicle accident on December 20, 1993 healed, according to Dr. Blackett. Claimant had nearly full range of motion in his cervical spine with only light restrictions.

2) Employer/carrier failed to submit medical documentation (clinical findings) in support of its Section 8(f) application showing that a pre-existing permanent disability materially and substantially contributed to the severity of the current injury. The employer/carrier also failed to submit evidence that the injury of February 9, 2001 was not the sole cause of claimant's alleged resulting disability.

3) Employer/carrier failed to submit documentation in support of its Section 8(f) application to show any additional loss in wage earning capacity due to the combination of his industrial injury and preexisting conditions. Employer's application did not demonstrate that carrier's liability is engaged because of Claimant's pre-existing and industrial conditions.

I agree that Employer is not entitled to Section 8(f) relief.

*Requirement for a Pre-existing Permanent Disability*

Employer argues that Claimant's 1993 motor vehicle accident significantly contributed to his current condition. ALJX 2 at 14-15. Claimant's December 20, 1994 motor vehicle accident resulted in a broken neck (the C-2 and C-3 vertebrae and his odontoid) that required him to wear an external halo fixator for several months, and in 1996 he requested vocational rehabilitation. Tr. at 75; Dr. Stark Depo. at 8. There actually were two fractures to the C-2 vertebra, and a fracture to the bone and the joint of the C-3 vertebra. Dr. Stark Depo. at 14.

Claimant had the "best possible fracture healing results," and a CAT scan taken on Feb. 23, 2004 showed no significant alignment abnormalities. Dr. Stark Depo. at 17. Claimant suffers from multi-level cervical spondylosis (arthritis) from the C-3 to C-6 vertebra. Dr. Stark

believes that this spondylosis is, in part, due to Claimant's fracture of the superior articulate facet, which was injured in 1993. Dr. Stark Depo. at 17-18. Claimant's spondylosis was detected by an MRI performed on March 15, 2001. Dr. Stark Depo. at 18.

The broken neck did not diminish his wage earning capacity, nor did it motivate a cautious employer to dismiss him. Claimant's spondylosis was only discovered after the February 9, 2001 injury. Because Claimant was not diagnosed with the spondylosis until after his February 9, 2001 injury, it is not considered a pre-existing disability.

*Requirement that the Pre-existing Disability Be Manifest*

Assuming that Claimant's spondylosis amounted to a pre-existing disability, the disability must be manifest to the employer. However, the Employer had neither actual nor constructive knowledge that the Claimant had any prior injuries to his back and neck. Other than Claimant seeking vocational rehabilitation in 1996, there is no evidence that Claimant reported the injuries or sought any further medical attention after his injury reached maximum medical improvement. Tr. at 77. Claimant testified credibly at trial that he has not suffered any effects from his 1993 accident, and that he "came out of [the accident] 100 percent." Tr. at 76. Claimant's wife also testified credibly that Claimant had no after effects from the 1993 accident, and that he returned to work following his recovery. Tr. at 52-53. Accordingly, no pre-existing disabilities of the Claimant were manifest to Employer.

*Requirement that the Pre-existing Disability Contributed to the Subsequent Injury*

If an ultimate disability is only partial, the employer must establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. § 702.321(a)(1). In this case, Claimant did not suffer from a pre-existing disability, therefore, there can be no finding that a pre-existing disability contributed to the subsequent injury.

In conclusion, because there was no pre-existing disability, no manifestation of a pre-existing disability and no contribution of the pre-existing disability to the February 9, 2001 injury, Employer's application for Section 8(f) relief is denied.

## ORDER

It is hereby ORDERED that:

1. Claimant is awarded permanent total disability from Respondents Port of Oakland Authority and its carrier TIG Insurance Group, for the period February 9, 2001 to March 3, 2003 at the weekly compensation rate of $868.96 (*i.e.*, two thirds of the average weekly wage of $1,316.61), plus the increases required by section 10(f);

2. Claimant is awarded permanent partial disability benefits for the period from March 4, 2003 through February 21, 2004 at a compensation rate equals two thirds of the

difference between the average weeekly wage of $1,316.61 less the earnings he could have received of $300.00 per week;

3. Claimant is awarded permanent partial disability benefits for the period from February 21, 2004 (when he began work as a limousine driver) until the present and continuing payable at a compensation rate that equals two thirds of the difference between the average weekly wage of $1,316.61 and weekly earnings as a limousine driver of $300.00;

4. Respondents shall pay interest on unpaid benefit installments calculated from the time each payment became due, at the rate provided by 28 U.S.C. § 1961;

5. Employer and carrier shall pay medical expenses under section 7 of the Act as may be prescribed for the care and treatment of the injuries Claimant sustained on February 9, 2001;

6. The District Director is authorized to make and adjust any calculations necessary to implement this order.

7. Claimant is entitled to recover his attorneys' fees and costs from Respondents Port of Oakland Authority and TIG Insurance Group. Claimant must petition for attorney fees and costs within twenty (20) days after service of the Decision and Order by the District Director. The petition must be prepared on a line item basis and comply with 20 C.F.R. § 702.132. Employer may object to any line item within 10 days after receiving the petition. All objections must be explained by reference to the relevant line item, or the item will be deemed accepted by Employer and allowed. Claimant may file a line item reply within 10 days after receiving any objections. Claimant's counsel shall arrange a meeting within 10 days thereafter, at which counsel for both parties will attempt to resolve all objections. The meeting may be in person or by telephone. Claimant's counsel shall file a report 10 days after the meeting explaining which objections have been resolved, and identifying any that remain for decision.

A

WILLIAM DORSEY
Administrative Law Judge